

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EVERETT D. HUMBERT, JR.

Claimant

VS.

GOODYEAR TIRE & RUBBER COMPANY

Respondent

AND

TRAVELERS INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 157,724

ORDER

ON the 2nd day of December, 1993, the application of claimant, respondent, and Kansas Workers Compensation for review by the Appeals Board of an Award by Administrative Law Judge James R. Ward dated November 10, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Robert E. Tilton, of Topeka, Kansas. The respondent and its insurance carrier appeared by and through their attorney, James E. Benfer, of Topeka, Kansas. The Kansas Workers Compensation fund appeared by and through its attorney, James B. Biggs, of Topeka, Kansas. There were no other appearances.

ISSUES

The parties have consolidated claims from four separate accidents under this single docket number. The parties have stipulated to compensability of each claim. The average weekly wage has been stipulated to for each accident and the respondent and Fund have reached agreement that the Kansas Workers Compensation Fund will be responsible for 70 percent of any of the amounts to be paid for each date of accident. The Appeals Board hereby adopts for purposes of its decision all stipulations made by the parties as listed in the Award of the Administrative Law Judge dated November 10, 1993.

After stipulations, there remained for decision by the Administrative Law Judge the following issues:

- (1) Nature and extent of claimant's disability for each accident.
- (2) Future medical for each.
- (3) Whether the respondent and Kansas Workers Compensation Fund are entitled to credit from an award for bilateral carpal tunnel made for an accidental injury occurring on May 11, 1987.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties have presented argument to the Appeals Board only relating to the issue of nature and extent of the disability for each accident. The Appeals Board does, for purposes of this decision, adopt the findings by the Administrative Law Judge relating to future medical, unauthorized medical, and credit for the prior award. Specifically, the Appeals Board finds that the claimant is entitled to unauthorized medical expense up to the statutory maximum of \$350.00 for each date of accident, subject to presentation of proper evidence of the amount of the expense incurred. For each accident, the Appeals Board awards future medical upon application only. Finally, the Appeals Board adopts the finding by the Administrative Law Judge that there was no evidence which would support a decision to grant credit under K.S.A. 44-510e for amounts paid on claimant's prior carpal tunnel injury claim and that credit is, therefore, denied.

There remains to be determined in this appeal the nature and extent of disability resulting from each of the four separate accidents. The four separate accidents include an injury of August 23, 1990, to claimant's left hand, an injury of January 12, 1991, to his right hand, an injury of April 18, 1991, to his low back, and an injury of May 15, 1991, to his left thumb, index and long fingers. For purpose of this award each date of accident will be discussed separately.

(1) Claimant has not met his burden of establishing what, if any, permanent disability may have resulted from the August 23, 1990 injury to his left thumb and accordingly, the claim for an award of permanent disability from that accident should be and is denied.

No evidence has been presented which would indicate the nature and extent of permanent impairment which may have resulted from or be attributable to the August 23, 1990 accident. Claimant testified that on August 23, 1990, his left thumb started popping and cracking. Dr. Knappenberger treated claimant for this injury and ultimately performed a surgical release. The parties have stipulated that this accident was compensable. They have stipulated that claimant was paid six weeks temporary total disability benefits in the amount of \$1,668.00 and medical benefits in the amount of \$1,481.30 in connection with this accident.

The evidence further indicates, however, that claimant reinjured his left thumb on May 15, 1991, and thereafter a second surgical release was performed by Dr. Mary Ann Hoffman. The only assessment of impairment to claimant's left thumb was that made by Dr. Wertzberger after this second surgery.

The Appeals Board acknowledges that there is evidence from which one might conclude claimant did have permanent impairment from the August 23, 1990 accident. Claimant testified that the surgical release performed by Dr. Knappenberger did relieve problems in his left thumb but that he did still have problems. The Appeals Board also has before it testimony of Dr. Wertzberger giving his assessment of impairment to other fingers following surgery similar to that performed by Dr. Knappenberger on claimant's left thumb. He has diagnosed constrictive tenosynovitis and assesses 20 percent functional impairment for each of the fingers effected. With regard to the left thumb, however, the evaluation was made after a second injury and second surgery. Dr. Knappenberger's records relating to the first surgery were not introduced. Neither Dr. Wertzberger nor any other physician was asked for or gave an opinion assessing impairment to the left thumb resulting from the first injury only.

Under these circumstances the Appeals Board finds that there is not adequate evidence on which to base a judgment regarding nature and extent of permanent disability to claimant's left thumb from the first injury only. Claimant has failed to meet his burden and an award for benefits for permanent disability from the first accident is denied. The award for the August 23, 1990 accident is therefore limited to the stipulated temporary total and medical benefits.

(2) For the injury of January 12, 1991, claimant is entitled to an award based upon 17 percent impairment to his right hand.

For claimant's injury of January 12, 1991, the only evaluation is again that of Dr. Wertzberger. He assesses 20 percent impairment to the long finger for the constructive tenosynovitis, which he then converts to four percent of the right upper extremity. Based upon Jamar testing he assesses an additional ten percent to the upper extremity for loss of strength and two percent for involvement of the dominant extremity. He converts these to body as a whole ratings using AMA guides to arrive at a total of ten percent impairment of the whole body.

Since Dr. Wertzberger's ratings were the only ones introduced into evidence, the Appeals Board does consider it to be appropriate to rely upon those ratings, at least to the extent they are not shown to be unreasonable. Examination of the ratings and testimony relating to those ratings does, however, raise two issues. First, is it appropriate to consider

the loss of strength as reflected in the Jamar testing or should, as the Administrative Law Judge ruled, the Jamar testing be excluded from consideration? Second, what is the appropriate level on the schedule of injuries in K.S.A. 44-510d to be used for this award?

At Dr. Wertzberger's deposition, respondent objected to consideration of the Jamar testing on grounds that Dr. Wertzberger had not himself conducted the tests. Dr. Wertzberger did testify that the tests were performed at his direction and that they were performed in the manner in which he had asked that they be performed. The Administrative Law Judge excluded consideration of the Jamar tests in his award of 20 percent to the right long finger. The Appeals Board disagrees.

The rules of evidence are not strictly applied in workers compensation proceedings and the Appeals Board does not wish to adopt a rule which would require that all test reports or exams relied upon by the physicians in arriving at their conclusions must be supported by testimony of the person performing the tests. See, K.S.A. 44-523(a). The Appeals Board considers admissible the testimony of Dr. Wertzberger giving opinion based upon the Jamar tests.

The Appeals Board concludes that the appropriate level for disability assessment in this case is to the hand or 150 week level. In accordance with Director's Rule 51-7-8(d)(2) the evidence does establish both loss of use of the finger as well as loss of use of the hand. Claimant's complaints include stiffness in the hand with weakness and intermittent swelling. The incision for the surgical release was a mid-palmer incision. There is, conversely, no evidence of injury or disability to the wrist or above.

For purposes of this award, the Appeals Board refers to Tables 1 and 2 of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, to convert the ratings given by Dr. Wertzberger to ratings at the hand level. Pursuant to Table 1, 20 percent of the middle finger converts to four percent of the hand. Pursuant to Table 2, ten percent of the upper extremity converts to 11 percent of the hand and two percent of the upper extremity converts to two percent of the hand. Using the combined values chart, 11 percent, four percent, and two percent combine to 17 percent of the hand. The Appeals Board therefore awards claimant benefits for 17 percent of the right hand.

(3) For the injury of April 18, 1991, claimant is entitled to an award for 45 percent impairment of the body as a whole.

Claimant injured his low back on April 18, 1991, when he fell off a catwalk. He was treated by Dr. Powell, the company doctor, and continued to work until May 15, 1991, when he injured his left hand a second time. For his back injury, claimant was treated by Dr. Wright, a chiropractor, from June 3, 1991, through September 23, 1991. By virtue of an order of the Administrative Law Judge following a preliminary hearing, Dr. Mary Ann Hoffman then became the authorized treating physician for both his hands and low back. Dr. Hoffman treated for both conditions until March, 1992, when she released the claimant to return to work on a trial basis. Claimant worked for approximately 30 days but was unable to continue. Dr. Hoffman then sent him through a work hardening program. Claimant completed the work hardening program but has not returned to work. At age 47 he has retired from his work with respondent.

Evidence of both functional impairment and work disability was introduced. Dr. Wertzberger provided the only evaluation of functional impairment. Following his examination of August, 1992, he determined claimant had a 14 percent functional impairment to the body as a whole resulting from the low back injury. He recommended

the following restrictions:

"Mr. Humbert's functional capacity assessment documents the need to restrict exertional activities to 'light work' activities as described by the Dictionary of Occupational Titles, produced by the U.S. Department of Labor. His upper extremity problems preclude repetitious flexion, gripping release activities."

Work restrictions recommended by Dr. Hoffman and the work restrictions recommended by the work hardening personnel were also introduced. At the time he completed the work hardening program, the discharge note stated:

"...The client is feasible (extra precaution required) for work at his job in the medium-heavy work level with the following considerations..."

The listed considerations then indicate claimant was to do no lifting over 80 pounds on an occasional basis, was to ask fellow workers for assistance when needed, and was to follow proper lifting procedures, changing positions and doing stretching exercises throughout the day.

The restrictions recommended by Dr. Hoffman became progressively more limiting over time. On June 5, 1992, she recommends:

"I feel he has reached maximum benefit as far as his back and his hands are concerned. I do not feel that he should lift anything over 50 pounds. I do not feel that he should do anything that requires heavy gripping or grasping with both hands or a lot of repetitive motion in both hands because of the osteoarthritis."

On July 10, 1992, Dr. Hoffman completed a questionnaire for the respondent stating:

"No lifting over 20 pounds, no pushing or pulling, no repetitive use of hands, no bending, stooping..."

As of November 19, 1992, Dr. Hoffman stated the following restrictions:

"Patient can not use hands (repetitiveness) or (sic) pushing, pulling or grasping -no sitting longer than one hour, no lifting, carrying, bending or twisting over ten minutes..."

Evidence relating to work disability was introduced by the testimony of Michael Dreiling. He testified he did not consider it advisable for claimant to undertake a vocational rehabilitation plan. From his review of the various restrictions, he gave opinion that claimant suffered a loss of access to the open labor market ranging from 70 to 98 percent. He testified that much of this loss was due to claimant's inability to work with his hands. Based upon the low back injury alone he stated claimant should have a 45 percent loss of access to the open labor market. He determines the claimant has an 80 percent loss of earning capacity based upon a comparison of \$5.00 per hour or \$200.00 per week to the \$978.00 per week earned by claimant at the time of his injury.

Claimant asks the Appeals Board to award work disability giving full effect to the testimony of Mr. Dreiling. Respondent, on the other hand, takes the position that the award should be based upon a functional impairment only. The Appeals Board does not

consider either position to be wholly correct.

In support of limiting the award to functional impairment only, respondent argues that the claimant could have returned to work at the time he completed his work hardening program in May, 1991; that claimant's osteoarthritic condition thereafter deteriorated for a reason unrelated to his work; and that the subsequent deterioration should not be considered in determining the extent of claimant's disability. If the subsequent deterioration is not considered, respondent argues, the evidence does not warrant finding a work disability greater than the functional impairment.

The Appeals Board finds, however, that when viewed as a whole, the evidence does not convincingly establish that claimant could have returned to his prior employment at the time he was released from work hardening. In addition, the only evidence in the record relating to deterioration of an osteoarthritic condition relates to claimant's hand injuries, not to his low back condition. Differences in the various restrictions, as they may relate to the low back only, are differences of opinion rather than evidence that the condition has progressed or deteriorated for reasons unrelated to work. The Appeals Board finds reasonable and convincing the testimony of Mr. Dreiling that the claimant would have a 45 percent loss of labor market access due to the low back injury alone.

Respondent's argument hinges on complete acceptance of the restrictions from the work hardening discharge note. The work hardening discharge note is not considered convincing proof that claimant could have returned to work. The discharge note suggests that extra precaution would be required and other workers would be needed to assist. Claimant had in fact, attempted to do the work for approximately 30 days before starting the work hardening program. Dr. Hoffman's notes indicate that he did not do well even on light duty work and that his back condition had become worse while attempting to work. All recommended restrictions except those in the work hardening discharge note would preclude resumption of his work for respondent. Although Dr. Hoffman's recommended restrictions did become progressively more limiting, even those expressed shortly after his discharge from work hardening, would have precluded his return to his previous employment.

Respondent has argued that the restrictions expressed in the work hardening discharge note are the only valid ones because all other restrictions include consideration of the deterioration caused by the progression of the underlying osteoarthritis. This argument does not distinguish between hands and back. The evidence indicates claimant had osteoarthritis in his hands. Dr. Hoffman carefully limits her diagnosis of osteoarthritis to the claimant's hands. The back condition is, on the other hand, described as a degenerative disc disease, not osteoarthritis.

The loss of access to the open labor market is one prong of the two-prong analysis required to determine work disability. Loss of ability to earn a comparable wage must also be examined. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The Appeals Board does, for the reasons stated, find convincing Michael Dreiling's opinion that claimant had a 45 percent loss of access to the open labor market from his back injury. Unfortunately, neither he nor any other witness expresses an opinion as to wage loss from the back injury alone. Michael Dreiling's opinion that claimant has an 80 percent loss of earning capacity clearly includes consideration of claimant's hand injuries.

From the record as a whole, the Appeals Board concludes that the low back injury alone did, more probably than not, result in a substantial loss of ability to earn a

comparable wage. Claimant has worked for respondent since 1976. He has a GED with no specific vocational training or college education. More probably than not claimant would find it difficult to replace or even approach his relatively high preinjury wage. We cannot, however, state with any confidence, based upon the record before us, what that loss would be. Under the circumstances, we consider it appropriate to rely on the evidence of loss of access and give it full weight. Having considered both wage loss and loss of access factors, the Appeals Board finds it appropriate to award benefits based upon 45 percent general body disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(4) For the injury of May 15, 1991, claimant is entitled to an award based upon 25 percent permanent partial impairment to the left hand.

Claimant's testified that his left hand suddenly started bothering him again on May 15, 1991, while performing his regular duties. After a change of physician made pursuant by order of the Administrative Law Judge, Dr. Hoffman treated claimant's left hand primarily for injury to the left thumb, index and long fingers. She performed surgical release on each of these fingers in October, 1991.

As previously indicated Dr. Wertzberger assesses 20 percent impairment to each finger. The 20 percent assessed by Dr. Wertzberger is for the constrictive tenosynovitis only. He adds ten percent for the left upper extremity for loss of strength based upon the Jamar tests.

As in the case of the right hand, the Appeals Board considers the opinions of Dr. Wertzberger, including those based upon the Jamar testing, to be a valid basis for the award, but concludes the ratings should be converted to ratings at the hand level. Using Tables 1 and 2 of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, 20 percent of the thumb converts to eight percent of the hand, 20 percent of the index finger converts to four percent of the hand, and four percent of the long finger converts to four percent of the hand. Using the combined values chart, the three finger impairments convert to 16 percent of the hand. When loss of strength of 11 percent of the hand (ten percent of the upper extremity which converts to 11 percent of the hand) is included the total combined impairment to the left hand is 25 percent.

For the accident of May 15, 1991, claimant is hereby awarded benefits based upon 25 percent permanent partial impairment to the left hand.

AWARD

WHEREFORE, an award of compensation is hereby made in favor of claimant, Everett D. Humbert, Jr., and against the respondent, Goodyear Tire and Rubber Company, and its insurance carrier, Travelers Insurance Company, for an award of six weeks temporary total disability at the rate of \$278.00 per week in the total sum of \$1,668.00, for the accidental injury of August 23, 1990.

FURTHER AWARD IS MADE that claimant be granted future medical treatment for his injury of August 23, 1990, upon application only.

FURTHER AWARD IS MADE in favor of claimant against the respondent and its insurance carrier for 17 percent permanent partial loss of use of the right hand as a result of claimant's accidental injury of January 12, 1991, resulting in award for 25.5 weeks of compensation at the rate of \$278.00 per week, for a total sum of \$7,089.00, all of which

is due and owing to the claimant and ordered paid in one lump sum.

FURTHER AWARD IS MADE that claimant be granted future medical treatment for his injury to his right hand of January 12, 1991, upon application only.

FURTHER AWARD IS MADE in favor of claimant and against the respondent and its insurance carrier for 25 percent impairment to the left hand as a result of claimant's accidental injury of May 15, 1991, resulting in award of 59.71 weeks of temporary total disability compensation at the rate of \$278.00 in the sum of \$16,599.38 and 22.57 weeks at the rate of \$278.00 per week in the sum of \$6,274.46 for permanent impairment, making a total award of \$22,873.84 of which the full amount would be due and owing.

Future medical is granted upon application only for treatment in connection with claimant's injury to the left hand as a result of the accident of May 15, 1991.

FURTHER AWARD IS MADE in favor of claimant and against the respondent and its insurance carrier for 359.71 weeks of compensation at the rate of \$278.00 per week in the sum of \$100,000.00 for a 45 percent permanent partial disability as a result of claimant's accident injury of April 18, 1991.

As of January 21, 1994, there would be due and owing to the claimant the sum of \$40,112.62 payable in one lump sum, in connection with claimant's award for permanent partial disability as a result of his accidental injury of April 18, 1991. Thereafter, the remaining balance of compensation in the amount of \$59,887.38 shall be paid at \$278.00 per week for 208.67 weeks or until further order of the Director.

Future medical will be granted upon application only in connection with claimant's back injury of April 18, 1991.

Unauthorized medical of \$350.00 per accident is awarded, not exceeding \$1,400.00.

The Kansas Workers Compensation Fund is liable for 70 percent of the compensation awarded on all claims herein.

Claimant's attorney is granted a lien against the proceeds of the above award for 25 percent in accordance with K.S.A. 1992 Supp. 44-536.

Reporter's fees are assessed against the respondent and its insurance carrier to be paid directly as follows:

NORA LYON & ASSOCIATES	\$ 229.70
APPINO & ACHTEN REPORTING SERVICE	\$ 138.10
CURTIS, SCHLOETZER, HEDBERG, FOSTER & ASSOCIATES	\$ 691.80

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert E. Tilton, 1324 Topeka Blvd., Topeka, Kansas 66612
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George Gomez, Director